86-2055

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 19 _____

NO. _____

MARVIN E. CARROLL, JR.,
Petitioner

versus

CITY OF HUNTSVILLE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

I. Whether Petitioner's rights under Article I, Sections nine, ten and the Fifth and Fourteenth Amendments to the United States Constitution were violated when the Supreme Court of Alabama overruled law that existed at the time of Petitioner's conviction and then applied newly interpreted law to Petitioner's case, resulting in the affirmance of Petitioner's conviction, which was not possible under prevailing law at the time of Petitioner's trial.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term,
NO.

MARVIN E. CARROLL, JR.
Petitioner

versus

CITY OF HUNTSVILLE, ALABAMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

The Petitioner, Marvin E. Carroll, Jr. respectfully prays that a Writ of Certiorari issue to review the judgment of the Alabama Court of Criminal Appeals entered in this proceeding on March 10, 1987.

OPINION BELOW

The Petitioner's conviction in the trial court was reversed and remanded by the Alabama Court of Criminal Appeals in an opinion rendered on October 22, 1985 (See Appendix B). Application for rehearing was filed by Respondent within fourteen days of the above said date and on the 10th day of December, 1985, the Alabama Court of Criminal Appeals overruled Respondent's Application for Rehearing. On December 18, 1985 Respondent herein petitioned the Supreme Court of Alabama for Writ of Certiorari. On July third, 1986 the Supreme Court of Alabama granted said petition for Writ of Certiorari. The Supreme Court of Alabama reversed the Judgment of the Court of Criminal Appeals without

opinion on October 10, 1986 (See Appendix C). Petitioner herein filed an application for rehearing with the Supreme Court of Alabama on October 23, 1986. Petitioner's said application for rehearing was overruled with no opinion on January 30, 1987. On March 10, 1987 the Alabama Court of Criminal Appeals on remand from the Supreme Court of Alabama, rendered a judgment and opinion affirming the Petitioner's original conviction (See Appendix D).

JURISDICTION

The Petitioner's application for rehearing to the Supreme Court of Alabama was overruled on January 30, 1987, whereupon the Alabama Court of Criminal Appeals rendered judgment and opinion on March 10, 1987. This Petition for Writ of Certiorari was filed within sixty days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

STATEMENT OF THE CASE

On June 19, 1984, Petitioner, Marvin E. Carroll, Jr. was arrested by Huntsville, Alabama police and charged with Driving Under the Influence of Alcohol, via a Uniform Traffic Ticket and Complaint, hereafter referred to as the U.T.T.C. The U.T.T.C. served as the charging document throughout the proceedings in the City of Huntsville Municipal Court. On July 12, 1984, Petitioner was found "guilty as charged" in the City of Huntsville Municipal Court. The U.T.T.C. was never verified under oath by the arresting officer. On July 12, 1984, Petitioner appealed the said conviction in Huntsville, Alabama Municipal Court to the Circuit Court for Madison County for a trial de novo.

On November 16, 1984 the Supreme Court of Alabama rendered the decision of *Ex Parte Dison*, 469 So.2d 662 (1984), holding that an unverified, unsworn U.T.T.C. could not support a conviction due to lack of subject matter jurisdiction. The Supreme Court of Alabama further held that this defect caused any conviction based upon an unsworn U.T.T.C. to be void and that such a defect could not be waived and could be raised for the first time on appeal.

On December 3, 1984, the Petitioner's case was scheduled for trial in Madison County Circuit Court. Counsel for Petitioner moved the Circuit Court to have the warrant (in this instance the U.T.T.C.) quashed for failure by the city and the arresting officer to have the warrant (U.T.T.C.) sworn to or verified. The Petitioner also moved for the Circuit Court to dismiss the charge against the Petitioner for failure of the U.T.T.C. to adequately advise Petitioner of the specific charge against him. Each of the above motions were overruled and on December 6, 1984, the City of Huntsville filed in Open Court an unsworn written complaint charging the Petitioner with driving or being in actual physical control of a vehicle while under the influence of alcohol, or with a blood alcohol concentration of .10% or greater by weight. Upon introduction of the new charging document i.e. unsworn complaint, the attorney for Petitioner moved to quash and dismiss on appropriate grounds.

At trial on December 6, 1984, the Circuit Judge announced from the bench, after presentation of stipulated facts that he found the Petitioner guilty of driving under the influence. The Petitioner was fined Two Hundred Fifty Dollars plus court costs, given a suspended sentence of ten days in jail and required to attend the Highway Intoxication Seminar.

On December 6, 1984, Petitioner filed notice of appeal to the Alabama Court of Criminal Appeals. On October 22, 1985, said conviction was reversed and remanded by the Alabama Court of Criminal Appeals. Respondent's application for rehearing was overruled by the Alabama Court of Criminal Appeals on December 10, 1985. Respondent herein filed a Petition for Writ of Certiorari to the Supreme Court of Alabama on July 3, 1986 and said petition was granted. The Supreme Court of Alabama reversed the decision of the Alabama Court of Criminal Appeals on October 10, 1986 on the authority of *Ex Parte City of Dothan*, 501 So.2d 1136 (1986) which was rendered on July 25, 1986 and overruled *Ex Parte Dison*, 469 So.2d 662. Petitioner's application for rehearing was overruled on January 30, 1987. On March 10, 1987, the Alabama Court of Criminal Appeals rendered a judgment and opinion based upon the Supreme Court of Alabama remanding the case to that court. Hence, this Petition.

REASONS FOR GRANTING THE WRIT

1. The decision of the Alabama Court of Criminal Appeals, affirming the trial court's conviction of the Petitioner is in conflict with prior decisions of the Supreme Court of the United States, as it retroactively applied an enlargement of an interpretation of a criminal law in a manner precisely like an ex post facto law, such as Article I Sections 9 and 10 of the United States Constitution, and Amendments Five and Fourteen of the United States Constitution prohibit.

Petitioner respectfully maintains that the reliance by the Alabama Court of Criminal Appeals on *Ex Parte City of Dothan*, 501 So. 2d 1136 (1986) in its judgment and opinion rendered on March 10, 1987 violated Petitioner's constitutional rights under Article I Sections 9 and 10, of the Constitution of the United States, regarding ex post facto laws. Petitioner further contends that his rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were also violated.

The Petitioner was entitled to have his case decided based upon the prevailing law at the time of his trial. Before Petitioner's case was tried in circuit court, the Supreme Court of Alabama held in *Ex Parte Dison*, 469 So. 2d 662 (1984) that a lower court conviction for Driving Under the Influence was void if based upon an unverified complaint, and therefore, the circuit court did not have jurisdiction in Petitioner's trial de novo. In their opinion in *Ex Parte Dison*, 469 So. 2d 662 (1984), the Supreme Court of Alabama cited numerous Alabama Appellate cases that supported their holding and that clearly indicated that the rule of law concerning verification of complaints had long been the law in Alabama. *Slater v. State*, 230 Ala. 320, 162 So. 130 (1935), *Leonard v. State*, 52 Ala. App. 212, 290, So. 2d 673 (1974), *Hawkins v. State*, 20 Ala. App. 285, 101 So. 514 (1924), *Sparks v. State*, 39 Ala. App. 517, 104 So. 2d 764 (1958).

On October 10, 1986 the Supreme Court of Alabama reversed and remanded and the holding of the Alabama Court of Criminal Appeals in Petitioner's case with no opinion, other than to cite the authority of *Ex Parte City of Dothan*, 501 So. 2d 1136 (1986). The case of *Ex Parte City of Dothan*, 501 So. 2d 1136 (1986) overruled

Ex Parte Dison, 469 So.2d 662. Therefore, Petitioner's case which was tried in December 1985 was decided on a new interpretation of the law announced for the first time on July 25, 1986.

The prevailing law regarding required verification of charging documents at the time Petitioner raised the issue of the unsworn complaint in circuit court was the law of *Ex Parte Dison*, 469 So. 2d 662 (1984). Although *Ex Parte City of Dothan*, 501 So. 2d 1136 overruled the Dison decision on July 25, 1986, the Dison case was the prevailing law when Petitioner's case was tried on its merits in circuit court. For the Supreme Court of Alabama and the Alabama Court of Criminal Appeals to retroactively take away the application of *Ex Parte Dison*, 469 So.2d 662 from this case is in the nature of passage of an ex post facto law. Black's Law Dictionary, Revised Fourth Edition, delineates between an ex post facto laws and retrospective law when it states that:

> "Retrospective laws divesting vested rights are impolitic and unjust."

Petitioner was divested of rights by the Supreme Court of Alabama and the Alabama Court of Criminal Appeals.

This Honorable Court has addressed a very similar issue in the case of *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In that case, it was held that:

> Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law,

such as Article I, Section 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and or makes it greater than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390. If a state legislature is barred by the Ex post Facto clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. *Smith v. Cahoon*, 283 U.S. 553, 565. The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," *Hall*, General Principles of Criminal Law (2d Ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. [Footnotes omitted.]

This Court further held as follows:

We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the

> premises of another after being asked to leave, the constitutional proscription of ex post facto laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal.

> It is well recognized that while the Ex Post Facto Clause does not apply directly to the judiciary, it is applicable by analogy through the Due Process Clauses of the Fifth Amendment, *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L.Ed.2d 2670 (1977), and the Fourteenth Amendment to the United States Constitution. *Bouie v. Columbia*, 378 U.S. 347 S.Ct. 1967, 12 L.Ed.2d 894 (1964).

Petitioner submits that in the case of judicial interpretation of laws, due process of law prevents the retroactive application of a changed construction of a statute, just as legislative enactments cannot be retroactively applied.

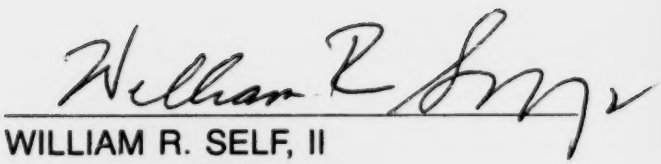
The principle behind Petitioner's position is sound and has been provided by this Court.

> "Providing fair notice that conduct is criminal is one of the central values of the Ex Post Facto Clause. *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L.Ed. 2d 344 (1977).

Petitioner respectfully maintains that he is entitled to have his case decided pursuant to the judicial interpretations that existed at the time of his trial. That is, Petitioner's case should have been decided based upon the prevailing law in *Ex Parte Dison*, 469 So.2d 662 (1984) which would have prevented Petitioner from being convicted of Driving Under the Influence.

CONCLUSION

For the reasons stated herein, and in the interest of justice, a writ of certiorari should issue to review the judgment of the Alabama Court of Criminal Appeals.



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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 19 ____
NO.

MARVIN E. CARROLL, JR.,
Petitioner

versus

CITY OF HUNTSVILLE, ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama County of Madison

I, William R. Self, II of 113 North Side Square, Huntsville, Madison County, Alabama, hereby certify that I have deposited for service three (3) copies of a Petition for Writ of Certiorari to the Honorable Charles Younger, City Attorney for the City of Huntsville, Alabama, and forty (40) printed copies to the Clerk of the Supreme Court of the United States.

This the 22 day of ~~May~~ June, 1987.

William R Self II

WILLIAM R. SELF, II
113 North Side Square
Huntsville, Alabama 35801
(205) 539-2100

State of Alabama County of Madison

Subscribed and sworn to before me on this 22 day of ~~May,~~ June 1987.

Vicki Lynn Kelley
NOTARY PUBLIC

My commission expires the 5th day of December, 19 90.

APPENDIX A

United States Constitution, Article I, Section 9

"The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding 10 dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation, or other direct tax shall be laid unless in proportion to the *census* or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No tax preference shall be given by any regulation of commerce or revenue to the ports of one state or those of another: nor shall vessels bound to, or from one state, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: And no person holding any office or profit or trust under them, shall, without

the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince or foreign state."

United States Constitution, Article I, Section 10

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in a war, unless actually invaded, or in such imminent danger as will not admit of delay."

United States Constitution, Amendment V

"No person shall be held to answer for a capital or other infamous crime unless on a

presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

United States Constitution, Amendment XIV, Section I

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

APPENDIX B

The decision of the Alabama Court of Criminal Appeals in the present case was as follows:

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1985-86

8 Div. 250

Marvin E. Carroll, Jr.
v.
City of Huntsville
Appeal from Madison Circuit Court

McMILLAN, JUDGE

From a conviction for the offense of driving while under the influence of alcohol, this appeal follows. Under the authority of *Ex Parte Dison*, 469 So.2d 662, (Ala.1984), appellant's conviction is due to be reversed and the case remanded.

Appellant, Marvin E. Carroll, Jr., was charged with the offense of driving while under the influence of alcohol on June 19, 1984, in violation of §14-2, *Municipal Ordinance*, City of Huntsville. Appellant was issued an Alabama Uniform Traffic Ticket and Complaint, (hereinafter referred to as "U.T.T.C."). On July 13, 1984, appellant was found guilty of the offense in Huntsville

Municipal Court and he appealed to the Madison County Circuit Court for a trial *de novo*. Appellant was again found guilty in circuit court and was fined $250.00, along with the court costs, and sentenced to ten days in the city jail.

Appellant's sole contention is that the U.T.T.C. was not properly sworn to and thus his conviction is void under the authority of *Ex Parte Dison*. Appellant's argument is that since the complaint was unsworn to in municipal court, the circuit court did not have proper subject matter jurisdiction for a trial *de novo*.

The City of Huntsville argues that *Dison* would not apply to convictions based on municipal ordinances, and thus the conviction is valid. However, as this court, per Judge Patterson, noted in the recent decision of *Gandy v. City of Birmingham*, [Ms. 6 Div. 500, September 24, 1985] ____ So.2d ____ (Ala.Cr.App.1985):

> "The use of the U.T.T.C. is required of all law enforcement agencies *and courts* of this state. See §12-12-53, *Code of Alabama* 1975; Alabama Rules of Judicial Administration, R.19. This obviously included municipal law enforcement agencies and municipal courts." *Id.* (Emphasis in original.)

Under the authority of *Gandy*, §12-12-53, *Code of Alabama* (1975), would apply to all law enforcement agencies, both municipal and state, as well as *municipal and state courts.*

From a review of the record on appeal, it is apparent that the U.T.T.C. does not bear the signature of a judge or magistrate as required by *Dison*. Under the *Gandy* analysis, the rationale set forth in *Dison* would apply not only to district court judgments, but also to municipal

court judgments. See also, *Carlson v. City of Huntsville*, [Ms. 8 Div. 242, June 11, 1985] ____ So.2d ____ (Ala.Cr.App.1985); *Graves v. City of Athens*, 472 So.2d 720 (Ala.Cr.App.1985); *Swann v. City of Huntsville*, 471 So.2d 1268 (Ala.Cr.App.1985); *Young v. City of Athens*, 469 So.2d 668 (Ala.Cr.App.1985); *Clark v. City of Andalusia*, 469 So.2d 668 (Ala.Cr.App.1985).

Under the authority of *Gandy*, the circuit court lacked jurisdiction to try the appellant on a void and unverified complaint. For this reason, the appellant's conviction is hereby reversed and the case remanded.

REVERSED AND REMANDED. All the Judges Concur.

APPENDIX C

The decision of the Supreme Court of Alabama was as follows:

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1986-87

Ex Parte: City of Huntsville, Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Marvin E. Carroll, Jr.
v.
City of Huntsville)

85-338

PER CURIAM.

The Judgment of the Court of Criminal Appeals is reversed and the cause remanded on the authority of *Ex Parte City of Dothan*, [Ms. 84-1316, July 25, 1986] ____ So.2d ____ (Ala.1986).

REVERSED AND REMANDED

Torbert, C.J., and Jones, Shores, Adams, and Steagall, JJ., concur.

APPENDIX D

The decision on remand to the Alabama Court of Criminal Appeals was as follows:

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1986-87

8 Div. 250

Marvin E. Carroll, Jr.
v.
City of Huntsville
Appeal from Madison Circuit Court

ON REMAND
FROM THE ALABAMA SUPREME COURT

McMILLAN, JUDGE

The appellant was convicted of the offense of driving while under the influence of alcohol and, on appeal, this court reversed and remanded the case on the authority of *Ex Parte Dison,* 469 So.2d 662 (Ala.1984) and *Gandy v. City of Birmingham,* 478 So.2d 11 (Ala.Cr.App.1985). Thereafter, The Alabama Supreme Court reversed the judgment of the Court of Criminal Appeals and remanded the cause on the authority of *Ex Parte City of Dothan*, [Ms. 84-1316, July 25, 1986] ____ So.2d ____ (Ala.1986).

I

The appellant argues that the Circuit Court of Madison County did not have jurisdiction over this case because the conviction in the Municipal Court of the City of Huntsville was void as an unsworn or an unverified complaint. However, the appellant has waived his rights to raise this issue. "[I]f the U.T.T.C. is not verified and the defendant does not object to this defect *before* trial, then the objection to the court's personal jurisdiction of the defendant has been waived." *Ex Parte City of Dothan, supra.* (Emphasis added).

II

The appellant contends that the warrant was fatally defective for its failure to properly and adequately advise him of the offense with which he was charged. Although the appellant did not raise the issue of a defective indictment in a pre-trial motion, "a defect in an indictment which results in a failure to charge an offense can be raised at any time. *Davidson v. State*, 351 So.2d 683 (Ala.Cr.App.1982)." *Cove v. State*, 435 So.2d 231, 233 (Ala.Cr.App.1983). However, the record indicates that the appellant was clearly apprised of the offense with which he was charged. The appellant argues that the U.T.T.C. charged him with the violation of 14-2 municipal ordinance and, under the rule of *Smith v. State,* 435 So.2d 158 (1983), he was not informed of the violation of "any specific offense condemned by Section 32-5A-191, *Code of Alabama,* 1975." The appellant quotes the section of the *Smith* decision which found an indictment fatally defective because it did not specify whether the defendant was guilty of violating §32-5A-191(a)(2) (driving under the influence of alcohol),

§32-5A-191(a)(3) (driving under the influence of a controlled substance), or §32-5A-191(a)(4) (driving under the combined influence of alcohol and a controlled substance). However, the record clearly indicates on the U.T.T.C. form, under the section entitled "Description of Offense" that the appellant was charged with driving under the influence of alcohol. Where an indictment contains language which conveys the meaning of a statute, see §15-8-21, *Code of Alabama* (1975), the violation of a code section may be satisfactorily charged despite the failure to cite the statute. *Bice v. State,* 472 So.2d 440, 442 (Ala.Cr.App.1985). "An indictment must not be held insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any defect or any imperfection in any manner or form which does not prejudice the substantial rights of the defendant on the trial." §15-8-4, *Code of Alabama* (1975). We find that the appellant was sufficiently informed that he was charged with the offense of driving under the influence of alcohol.

AFFIRMED. All the judges concur.

Supreme Court, U.S.
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No. 86-2055

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OCTOBER TERM, 1986

MARVIN E. CARROLL, JR.

Petitioner,

v.

THE CITY OF HUNTSVILLE,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

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III. Whether the U.S. Supreme Court should consider questions not disclosed on the record? 4

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OPINION BELOW

The Opinion below by the Petitioner is adequate for the purposes of Respondent's Brief.

JURISDICTION

Petitioner filed his Petition for Writ of Certiorari within the 60 days mandated by the rule. Jurisdiction is invoked under 28 U.S.C., Section 1257(3). The City denies that jurisdiction was properly invoked and insists that the Petition must be dismissed for lack of jurisdiction. *See* argument *infra.*

STATEMENT OF THE CASE

In his brief the Petitioner, Mr. Carroll, makes *no* reference to facts that would support the contention that a federal or constitutional issue was raised in the lower courts. The sections of Mr. Carroll's brief dealing with the "OPINION BELOW", the "JURISDICTION" and the "STATEMENT OF THE CASE" do *not* mention *rulings* by an Alabama Court that are in conflict with the U.S. Constitution. Mr. Carroll's failure to raise these issues or to show rulings contrary to the U.S. Constitution in lower courts leaves his appeal subject to attack by a Motion to Dismiss. Since Petitioner failed to meet the prerequisites for a successful appeal, his Petition should be dismissed by this Court. The record is void of facts to support a Petition of Certiorari.

Except for the above stated paragraph Respondent does not take issue with Petitioner's Statement of the case.

SUMMARY OF ARGUMENT

Mr. Carroll did not make objections based upon Federal Constitutional issues in the lower court proceedings. Since the record is void of such issues, this Honorable Court is without jurisdiction to hear Federal questions. In addition, Mr. Carroll was tried under the law of the State of Alabama. The judicial decisions cited by Mr. Carroll do not constitute an ex post facto law. There was no judicial enlargement of an Alabama statute.

ARGUMENT

Comes now the Respondent, the City of Huntsville, Alabama, who does hereby request that this Honorable Court refuse to grant a Petition for a Writ of Certiorari for the following reasons:

I. Mr. Carroll fails to follow the U.S. Supreme Court Rules for Certiorari

The Petition for a Writ of Certiorari is due to be dismissed because the appeal is not within the U.S. Supreme Court's jurisdiction and because the Petitioner, Mr. Carroll, fails to follow the U.S. Supreme Court Rules for Certiorari.

U.S. Supreme Court jurisdiction should be denied because the present Petition is not made in conformity with the rules of the United States Supreme Court. Supreme Court Rule 21.1(h) states:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions

> sought to be reviewed were raised; the method of manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." United States Supreme Court Rule 21.1(h).

The Petition in the present case fails to satisfy this rule by showing where, in the proceedings below, the federal questions and constitutional issues sought to be reviewed were raised. Consequently the Court lacks jurisdiction for this petition from the judgment of the Alabama Supreme Court. *Wilson v Cook*, 66 S Ct 663; 327 U.S. 474 (1946); *Hanson v Denckla*, 78 S. Ct 1228, 1234; 357 U.S. 235 (1958); *Fuller v Oregon*, 94 S. Ct. 2116, 2126; 417 U.S. 40 (1974).

II. Petitioner fails to mention any objections or exceptions that were raised in lower courts as a result of federal questions.

Petitioner's "Statement of the Case" does not mention any objections based on Federal grounds. No Constitutional provisions were mentioned in the trial of the case in Madison County Circuit Court, (the first Court of Record) or in the Alabama Court of Criminal Appeals, or in the Alabama Supreme Court. Thus, no Constitutional issues were raised in Alabama Courts. It is too late to raise these questions for the first

time in a Petition for A Writ of Certiorari in the United States Supreme Court. *See* cases *infra*.

Nowhere was the validity of the State Court decisions "drawn in question as to be repugnant to the Constitution, treaties or laws of the United States. Consequently, nowhere in the State Court's opinion were any of these [decisions] decided valid as opposed to arguments that they were repugnant to the Federal Constitution, treaties or laws." FRUMER and WAXNER, Bender's Federal Practice Forms, Form No. 5419, p. 108.

III. In the present case the U.S. Supreme Court should not consider questions not raised or disclosed by the record or which were not considered by the courts below.

Mr. Carroll failed to raise the issues in the case at bar during the lower court proceedings. Such issues were not a part of the record below. The necessity of preserving issues in the lower courts is a rule of law so accepted that it almost needs no citation to authorities to support is validity. Respondent will cite only the most recent cases: *Michigan Nat. Bank v. Robertson,* 83 S. Ct. 914, 372 U.S. 591, 9 L. Ed 961 (1963); Sunray Mid-Continent Oil Co. v. Federal Power Commission, 80 S. Ct. 392, 364 U.S. 137, 4 L. Ed 2d 1623 (1960), *reh. denied* 81 S. Ct. 32, 364 U.S. 856, 5 L. Ed 2d 80; *G. D. Searle & Co. v. Cohn,* 102 S. Ct. 1137, 455 U.S. 404, 71 L. Ed 2d 250 (1982); *Tennessee v. Dunlap,* 96 S. Ct. 2099, 426 U.S. 312, 48 L. Ed 660 (1976); *Winberger v. Ross,* 102 S. Ct. 1510, 457 U.S. 25, 71 L.Ed 2d 715 (1982); *U.S. v. Ortiz,* 95 S. Ct. 2585, 427 U.S. 891, 45 L. Ed 2d 623 (1975); *Rendeau v. Mosinee Paper Corp.,* 95 S. Ct. 2069, 422 U.S. 49, 45 L. Ed 12 (1975); *Wisconsin*

v. Federal Power Commission, 83 S. Ct. 1266, 373 U.S. 294, 10 L. Ed 2d 357 (1963), *reh denied* 84 S. Ct. 25, 375 U.S. 870, 11 L. Ed 2d 99; *Neely v. Martin Eby,* 875 Ct. 1072, 386 U.S. 317, 18 L. Ed 2d 75, *reh denied* 87 S. Ct. 1366, 386 U.S. 1027, 18 L. Ed 2d 471.

IV. Mr. Carroll was not tried under an ex post facto law.

The case relied upon by the Petitioner, *Bouie v City of Columbia,* 84 S. Ct. 1697, 378 U.S. 347 *12 L Ed 2d 894 (1964)* does not apply to the present case. The facts and principles of law are different. *Bouie, supra,* was basically a civil rights case involving an alleged trespass in a restaurant. In *Bouie, supra,* the South Carolina Supreme Court construed a trespass statute to "cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." *Bouie, supra,* at 1701. Thus, a substantive law was enlarged through judicial decision.

In the present case, the DUI statutes are not enlarged. The DUI statute is the same before and after the *Dison* decision. Mr. Carroll's rights were not affected by an enlargement of a previously enacted statute.

In *Bouie, supra,* the Court noted that a criminal statute must give fair warning of the conduct that it makes a crime. In the present case, the DUI statute remains the same. It is not changed by a decision of the Alabama Supreme Court. The Alabama Supreme Court did not construe the Alabama DUI laws to apply retroactively to Mr. Carroll as the Court did in

the *Bouie* case. *See Bouie, supra,* at 1703. *Bouie* presented the rare case of a judicial change in a statute which operates ex post facto. The case at bar does not present ex post facto legislation.

Since the *Bouie* case does not apply to the present fact situation, other cases must be considered to find the law in the present case. "It is a settled principle, recognized at least by implication in virtually every [Court] decision . . . that the United States Constitution's ban on ex post facto laws applies strictly to legislative acts and does not extend to changes in the law effected by judicial decisions. *Calder v Bull,* (1978) 3 U.S. 386, 1 L Ed 648 (opinion of Paterson J.); *Ross v Oregon,* (1913) 227 U.S. 150, 57 L Ed 458, 33 S.Ct. 220; *Frank v Mangum,* (1915) 237 U.S. 309, 59 L Ed 969, 35 S.Ct 582; *Marks v United States,* (1977) 430 U.S. 188, 51 L Ed 2d 260, 97 S.CT. 990." *Annotation* 53 L Ed 2d 1146; 16A Am Jur 2d Constitutional Law Sec. 638 P. 590.

> "Thus, in Ross v Oregon (1913) 227 US 150, 57 L Ed 458, 33 S Ct 220, the court observed that Article I, sec 10 of the United States Constitution, according to the natural import of its terms, is a restraint upon legislative power, and concerns the making of laws rather than their construction by the courts. The Court went on to say that while the provision is directed against legislative rather than judicial acts, it reaches every form in which the legislative power of a state can be exerted, whether it is a constitution, a constitutional amendment, an enactment of the legislature, a bylaw or ordinance of a municipal corporation, or a regulation or or-

> der of some other instrumentality of the state exercising delegated legislative authority.
>
> Similarly, it was declared in Frank v Mangum (1915) 237 US 309, 59 L Ed 969, 35 S Ct 582, that the constitutional prohibition of Article I, sec. 10, of the United States Constitution, that no state shall pass any ex post facto law is, as its terms indicate, directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.
>
> And in Marks v United States (1977) 430 US 188, 51 L Ed 2d 260, 97 S Ct 990, the court noted that the ex post facto provision contained in Article I, Section 9, clause 3, of the Constitution, is a limitation upon the powers of the legislature, and does not of its own force apply to the judicial branch of government." Annotation, 53 L Ed 2d 1146.

The settled Alabama law at the time of Mr. Carroll's arrest for driving under the influence was contrary to the decision in *Ex Parte Dison*, 469 So. 2d 662 (1984). The law finally applied to petitioner's case was the law in effect at the time of his offense. That law was enunciated in *Ex Parte City of Dothan*, 501 So 2d 1136 (1986) which overruled *Dison* to return to the established law in the State of Alabama.

Mr. Carroll argues that because of *Dison* he should be permitted to object to an unsworn complaint. *Dison* was an anomaly. The consensus of Alabama case law has always been that an unsworn complaint is void in a prosecution under a *municipal* ordinance only if an objection was made in municipal court. A

failure to raise the issue bars a party from objecting to an unsworn complaint on appeal. *Howard v City of Bessemer*, 114 So. 2d 158, (Ala. Ct. App. 1957); *Brooks v City of Birmingham*, 20 So. 2d 115 (Ala. Ct. App. 114); *Williams v City of Birmingham*, 133 So. 2d 713, (Ala. Ct. App. 1961); *Robinson v City of Sylacauga*, 72 So. 2d 125, (Ala. Ct. App. 1954); *Chaney v City of Birmingham*, 21 So. 2d 268 (Ala. Ct. App. 1944); *Turner v Town of Lineville*, 56 So. 603 (Ala. Ct. App. 1911); *Borok v City of Birmingham*, 67 So. 389 (Ala. 1914); *Clark v Town of Uniontown*, 58 So. 725 (Ala. Ct. App. 1912).

In the case at bar, no timely objection was interposed, so the petitioner cannot now complain of a lack of a sworn affidavit before the recorder. The reasoning and authorities in the *Chaney, supra*, case merit recital in the present case:

> "While one on trial in a Recorder's Court for the violation of a municipal ordinance is entitled to be apprised of the nature and cause of the prosecution against him by written complaint *(Mayor, etc of City of Birmingham v O'Hearn*, 149 Ala. 307, 42 So. 629), that an accused was arrested and tried in such court without a written complaint (affidavit) *does not render the judgment there entered void for want of jurisdiction. Brooke v State*, 155 Ala. 78, 46 So. 491; *Sherrod v State*, 197 Ala. 286, 72 So. 540. (Emphasis Supplied) Thus for the reason that he may waive the right. 43 C.J. 459.
>
> If the defendant proceed to trial in such court without demanding such complaint, he

> is held to have waived the right and, later on appeal, he cannot for the first time avail of it. *Alderhold v City of Anniston*, 99 Ala. 521, 12 So. 472; *McKinstry* case, supra; *Clark v City of Uniontown*, 4 Ala. App. 264, 55 So. 725; *Wofford Oil Co v City of Russelville*, 20 Ala. App. 14, 100 So. 304; *Worthington v City of Jasper*, 197 Ala. 589, 73 So. 116; *Arzumanian v City of Birmingham*, 165 Ala. 374, 51 So. 645." *Chaney, supra* at 272-273.

The above cited cases prove that the decision in *Dison*, supra, under established Alabama law, was incorrect. *Dison*, supra, was a new interpretation of the law. Established Alabama law was in accord with *Ex Parte City of Dothan, supra*, and Mr. Carroll's case was decided under such law. Mr. Carroll was not, as he alleges, tried under a "new interpretation of the law." To claim that *Ex Parte City of Dothan* imposed an ex post facto law is pure sophistry. *Ex Parte City of Dothan* restated the correct Alabama law on the necessity of an objection to the lack of a sworn complaint in Municipal Court.

CONCLUSION

This Petition for a Writ of Certiorari should be dismissed for numerous reasons. First, Mr. Carroll fails to follow the U.S. Supreme Court rules for Certiorari. Second, the Federal Constitutional issues were not properly raised in the lower court. In addition the U.S. Supreme Court should not consider questions not disclosed on the record. Finally, Mr. Carroll was not tried under an ex post facto law because there was no judicial enlargement of a statute.

For these reasons Respondent, the City of Huntsville, Alabama, does hereby request that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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